

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

WHITTINGTON V. LEGENT CLEARING

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

AMY J. WHITTINGTON, APPELLANT,
V.
LEGENT CLEARING, L.L.C., APPELLEE.

Filed April 27, 2010. No. A-09-788.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge.
Affirmed.

D.C. Bradford and Ryan J. Dougherty, of Bradford & Coenen, L.L.C., for appellant.

Gillian G. O'Hara, of Kutak Rock, L.L.P., for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Amy J. Whittington entered into an employment contract with Legent Clearing, L.L.C. Subsequently, Legent Clearing terminated Whittington's employment. Whittington filed a complaint in district court alleging that Legent Clearing breached the employment contract. Legent Clearing filed a motion for summary judgment which the district court granted after finding that Legent Clearing had complied with the terms of the employment contract. Whittington appeals from the district court's order. For the reasons set forth below, we affirm.

II. BACKGROUND

The facts in this case are largely undisputed. Whittington was employed by Legent Clearing as a salesperson. In September 2007, Whittington and Legent Clearing entered into an employment contract, referred to by the parties as a "Salesperson Commissions Agreement." The

Salesperson Commissions Agreement governed the terms of Whittington's employment with Legent and outlined her position as an at-will employee. In addition, the agreement included a section entitled "Commissions After Termination of Employment," which provided in relevant part:

Upon termination of Salesperson's employment with LEGENT for any reason other than resignation or misconduct, Salesperson shall be offered the opportunity to execute a post-employment agreement containing certain provisions, including certain noncompete provisions, in exchange for LEGENT's agreement to continue the calculation for payment of commission for twelve months beyond Salesperson's last day of employment with LEGENT. Should Salesperson decline to execute the post-employment agreement offered by LEGENT, Salesperson shall receive only those commissions that would have been payable to Salesperson under this Agreement after month end of the month in which Salesperson's employment terminated, and in no event shall the calculation for payment of commissions extend beyond Salesperson's last day of employment with LEGENT.

On April 14, 2008, Legent Clearing terminated Whittington's employment. It is not clear from our record whether this termination was a result of any misconduct. Legent Clearing alleges that Whittington's employment was terminated for the reason of misconduct related to her insubordination and failure to cooperate with her supervisor. Whittington disputes this claim and alleges that her employment was not terminated for misconduct.

Despite the reasoning for Whittington's termination of employment, it is clear that Legent Clearing did not immediately offer Whittington the opportunity to execute a postemployment agreement as contemplated by the Salesperson Commissions Agreement. Instead, on April 14, 2008, Legent Clearing offered Whittington the opportunity to execute a "Separation Agreement."

The April 14, 2008, Separation Agreement provided that Legent Clearing shall pay to Whittington "[a] series of equal payments equivalent to eight (8) weeks pay at . . . Whittington's current base rate of pay, paid according to the normal payroll schedule of Legent, beginning on the first regular payday following . . . Whittington's execution and return of this Agreement." The agreement required Whittington to agree to relinquish certain claims she may have had against Legent Clearing and to keep the terms of the agreement confidential. Whittington declined to sign the agreement.

After Whittington refused to sign the Separation Agreement, Legent immediately offered her the opportunity to execute a different Separation Agreement. The only pertinent difference between the second agreement and the original agreement was that Legent Clearing now offered to pay Whittington the equivalent of 13 weeks' pay at her current base rate of pay. Whittington again declined to sign the agreement.

On April 24, 2008, Legent Clearing offered Whittington the opportunity to execute a third Separation Agreement. The only pertinent difference between this agreement and the first two agreements was that Legent Clearing now offered to pay Whittington the equivalent of 26 weeks' pay at her current base rate of pay. Whittington declined to sign the agreement.

On June 3, 2008, Whittington's counsel sent Legent Clearing a letter asking to discuss settlement of Whittington's claim against Legent Clearing. Included with the letter was a draft of

a complaint. After receiving this correspondence, Legent Clearing offered Whittington the opportunity to execute a “Post Employment Agreement and General Release.” Although the agreement is dated June 24, 2008, it is clear from the record that Whittington and her counsel did not receive the document until July 1, 2008.

The Post Employment Agreement and General Release provided, in part:

Upon full execution of this Agreement, and full compliance with its terms, consistent with the terms of the Commissions Agreement, Legent shall continue the calculation for payment of commissions under the Commissions Agreement for twelve (12) months beyond . . . Whittington’s last day of employment with Legent. The Commissions Payments shall be paid in accordance with the terms and conditions outlined in Schedule A to the Commissions Agreement

In exchange for this compensation, Whittington had to agree to relinquish certain claims against Legent Clearing and to comply with various noncompete provisions. The agreement provided that the offer would expire at the end of the business day on July 1, 2008.

Whittington did not respond to Legent Clearing’s offer of the Post Employment Agreement and General Release until July 30, 2008. At that time, Whittington’s counsel forwarded to Legent Clearing a revised draft of the Post Employment Agreement and General Release. Whittington’s counsel also indicated that Whittington would be willing to accept a lump-sum settlement payment of \$175,000 in exchange for her relinquishing certain claims against Legent Clearing and her compliance with the noncompete provisions of the agreement.

Legent Clearing did not accept Whittington’s proposed changes to the agreement or her offer to accept a lump-sum settlement payment. Legent Clearing informed Whittington that it had offered her the standard postemployment commissions agreement and that it “does not individually negotiate its post-employment commissions agreements with departing salespersons.” Legent Clearing indicated that it might consider reoffering Whittington the original Post Employment Agreement and General Release if she would now be willing to accept that offer.

On August 12, 2008, Whittington filed a complaint in district court alleging that Legent Clearing had breached the terms of their employment agreement. Whittington alleged that Legent “has failed and refused to offer [her] the opportunity to execute a post-employment agreement and failed and refused to continue the calculation for payment of commissions to [her] for twelve months beyond [her] last day of employment with [Legent Clearing].”

Legent Clearing filed a motion for summary judgment, which the district court granted. The court found that Legent Clearing offered Whittington a postemployment agreement and general release. The court went on to find that “[t]he agreement is in conformance with the salesperson commission agreement agreed to on September 20, 2007, specifically that in paragraph 3 the commissions due the salesperson after termination shall continue for 12 months beyond salesperson’s last day of employment with Legent.”

Whittington appeals from the district court’s order here.

III. ASSIGNMENTS OF ERROR

On appeal, Whittington assigns as error, restated and consolidated, that the district court erred in granting Legent Clearing’s motion for summary judgment.

IV. STANDARD OF REVIEW

Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009). In reviewing summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

V. ANALYSIS

Whittington argues that the district court erred in granting Legent Clearing's motion for summary judgment because there is disputed evidence concerning whether Legent Clearing breached the terms of the Salesperson Commissions Agreement. Upon our review, we find that there is no evidence that Legent Clearing breached the Salesperson Commissions Agreement. As such, we affirm the district court's order granting Legent Clearing's summary judgment motion.

In order to recover in an action for breach of contract, a plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that actuate the defendant's duty. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002). There is no dispute that the parties agreed to the terms of the Salesperson Commissions Agreement and that as a part of that agreement, Legent Clearing promised to offer Whittington "the opportunity to execute a post-employment agreement containing certain provisions, including certain noncompete provisions, in exchange for [Legent Clearing's] agreement to continue the calculation for payment of commission for twelve months beyond [Whittington's] last day of employment with [Legent Clearing]" if her employment was terminated for reasons other than misconduct or resignation. At issue here is whether Legent Clearing breached its promise to offer Whittington the postemployment agreement.

A breach is a nonperformance of a duty. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). Whittington alleged in her complaint that Legent Clearing breached the Salesperson Commissions Agreement when it "failed and refused to offer [her] the opportunity to execute a post-employment agreement and failed and refused to continue the calculation for payment of commissions to [her] for twelve months beyond [her] last day of employment with [Legent Clearing]."

It is undisputed that on July 1, 2008, Legent Clearing offered Whittington the opportunity to execute a Post Employment Agreement and General Release. As a part of that agreement, Legent Clearing offered to continue the calculation for payment of commissions to Whittington for 12 months beyond her last day of employment with Legent Clearing. In exchange for this compensation, Whittington had to comply with certain noncompete provisions. This is the exact postemployment agreement contemplated in the Salesperson Commissions Agreement.

We digress briefly to note that the district court found that the Post Employment Agreement and General Release was offered to Whittington on June 24, 2008, rather than on July 1. It is clear from the record that although the agreement was dated June 24, 2008, it was not forwarded to Whittington or her counsel until July 1. As such, the district court erred in finding that the agreement was offered to Whittington on June 24. However, such error is harmless

because Whittington did not offer any evidence to demonstrate that the delay between her termination in April 2008 and the offer of the postemployment agreement prejudiced her in any way. In addition, in our analysis, we considered that the postemployment agreement was offered to Whittington on July 1.

In her brief to this court, Whittington argues that Legent Clearing breached the Salesperson Commissions Agreement when it offered her the three “Separation Agreements” after her employment was terminated. She asserts that Legent Clearing’s ultimate offer of the Post Employment Agreement and General Release did not “cure” this breach because it was offered only after Whittington forwarded Legent Clearing a draft of a complaint she intended to file in district court. Whittington’s argument has no merit.

Even if we were to assume that Legent Clearing’s offer of the separation agreements did constitute a breach of the Salesperson Commissions Agreement, such breach was certainly cured when Legent Clearing offered Whittington the opportunity to execute the Post Employment Agreement and General Release. This agreement complied with the terms of the Salesperson Commissions Agreement and was precisely what Whittington was requesting. While Whittington appears to argue that this agreement was not the typical agreement Legent Clearing offered to its departing salespersons, there is no evidence to support this assertion.

The Nebraska Supreme Court has indicated that there are circumstances where a promise to comply with the terms of a contract was made too late and, as a result, could not cure a prior breach. See *Wright v. Farmers Mutual of Nebraska*, 266 Neb. 802, 669 N.W.2d 462 (2003). However, there is no indication that Legent Clearing’s offer was made too late. Legent Clearing offered Whittington the opportunity to execute the postemployment agreement prior to Whittington’s filing a claim in district court. The agreement complied with the terms of the Salesperson Commissions Agreement and cured any previous breach.

Whittington also argues in her appellate brief that Legent Clearing did not provide her a reasonable amount of time to consider its offer of the Post Employment Agreement and General Release and that such offer was not made in good faith. However, there is no suggestion in the record that these arguments were presented to the trial court. Rather, in Whittington’s complaint and at the summary judgment hearing, Whittington argued only that she was never offered the opportunity to execute a postemployment agreement as contemplated by the Salesperson Commissions Agreement. An issue not presented or decided by the trial court is not appropriate for consideration on appeal. *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005); *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004).

VI. CONCLUSION

There is no evidence that Legent Clearing breached the Salesperson Commissions Agreement. Rather, the evidence presented at the summary judgment hearing clearly establishes that Legent Clearing offered Whittington the opportunity to execute the exact postemployment agreement contemplated in the Salesperson Commissions Agreement. As such, we find no genuine issues of material fact and we affirm the district court’s order granting Legent Clearing’s summary judgment motion.

AFFIRMED.